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No. 88-1674

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM JOSEPH HEALY, JR.,

Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court below were: William Joseph Healy, Jr. and the New York Life Insurance Company.[1]

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[1] Pursuant to Rule 28.1 of the Rules of the Supreme Court respondent herein discloses that New York Life Insurance Company is affiliated with or has an interest in the following companies, corporations or partnership entities: NYLIFE Canada Limited; NYLIFE Inc.; New York Life Insurance and Annuity Corporation; New York Life and Health Insurance Company; New York Life and Insurance Company of Canada; NYLIFE Insurance Company of Arizona; NYLIFE Fund Management Ltd.; NYLIFE Equity Inc.; NYLIFE Realty Inc.; NYLIFE Mortgage Inc.; MacKay-Shields Financial Corporation; NYLIFE Securities Inc.; NYLIFE Funding Inc.; Madison Benefit Administrators, Inc.; Hillhouse Associates Insurance, Inc.; New York Life Fund, Inc.; New York Life VLI Series Fund, Inc.; New York Life MFA Series Fund, Inc.; MacKay-Shields MainStay Series Fund; Amenia Holding Corporation; NYLCO, Inc.; New York Life Capital Corp.; New York Life Foundation; American Exploration Company which owns 100% of the shares of: Amex Oil Company; Austral Oil Company, Inc.; South States Oil & Gas Company; American Exploration Operating Company; Transportation Holding and Development Company; American Exploration Production Company; and American Exploration Acquisition Company; Corporate Medical Management, Inc.; Greystone Realty Corporation; Greystone Realty Partners, Inc.; Greystone Realty Advisers, Inc.; Greystone Realty Finance, Inc.; Greystone Realty Management, Inc.; Monitor Capital Advisors, Inc.; New York Capital Resources, Inc.; New York Life Insurance Worldwide Ltd.; New York Life International Investment Inc.; General Assets Money Management Associates B.V.; Gamma Advisers Limited; Japan Gamma Asset Management Limited; General Assets Money Management Associates N.V.; Gamma Trust S.A.; New York Life Worldwide Holding, Inc.; NYLIFE Advisers, Inc.; NYLIFE Depositary Corporation; NYLIFE Leasing Inc.; Sanus Corp. Health Systems; Prime Provider Corp.; Prime Provider of Corp. of Texas; Sanus Health Plan of New Jersey, Inc.; Sanus Health Plan of Greater New York, Inc.; Sanus of New York, Inc.; Sanus of Texas, Inc.; Sanus Dental Plan of Texas, Inc.; Sanus Health Plan, Inc.; Sanus/Passport Preferred Services, Inc.; Sanus of Missouri, Inc.; Sanus Preferred Services, Inc.; Sanus Preferred Providers West, Inc.; Sanus Dental Plan of New Jersey, Inc.; Sanus Dental Plan, Inc.; Sanus Texas Health Plan, Inc.; Sanus Preferred Physicians, Inc.; Lone Star Health Plan, Inc.; Maxicare Texas, Inc.; HealthPlus, Inc.; Express Scripts, Inc.; Annac Holding Corporation; and Revco D.S. Inc.

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STATUTE

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STATEMENT OF CASE

Respondent employer conducted a company-wide reduction in force ("RIF") to reduce its management payroll by 20 percent. After voluntary retirements, 151 additional involuntary terminations were made and each received a generous severance package including for most a full year's salary and other benefits. There is no dispute that the involuntary terminations had no

disparate impact upon the protected age group either within petitioner's department or the Company as a whole.

Petitioner Healy was one of those terminated. He sued respondent claiming that his employment was terminated because of his age (56).

The Courts below found that Healy was selected for termination because top management of his department determined that he lacked the managerial abilities to take on the far broader responsibilities that would be required following the reduction in management staff.

Following Healy's termination, petitioner's position, Marketing Vice President for Management Training, was eliminated. Two other corporate officers (ages 47 and 55) each added portions of Healy's duties to their job functions and performed the increased workload thereafter.

The district court carefully analyzed the record and granted defendant's motion for summary judgment holding that petitioner failed to produce any evidence of age discrimination or direct or indirect evidence showing that the reasons offered by defendant for his termination were mere pretext. (Appendix C 56a, 59a).

The Third Circuit, in an opinion by Judge Becker joined by Judge Higginbotham affirmed. The court stated:

> In the end, the evidence provided by Healy demonstrated only that he performed competently in his previous jobs. But the essence of a RIF [reduction in force] is that competent employees who in more prosperous times would continue and flourish at a company may nevertheless have to be fired. To create a factual dispute as to pretext, Healy must not only introduce evidence from which a reasonable person could infer that he is qualified; he must also introduce evidence that cast doubt on his employers contention that there was a legitimate business justification for letting him go.

(Appendix B 26a).

The court, therefore held that the petitioner did not meet his evidentiary burden of demonstrating a genuine issue of material fact. (Appendix B 26a-27a).

The legal principles petitioner Healy advances in his Petition for Writ of Certiorari for the proper standard for summary judgment in age discrimination action were in fact accepted and applied by the Courts below. At most, the only issue Healy raises here is the Court's application of the "facts" Healy asserted to that law. That is not a basis for granting a Writ for Certiorari. Accordingly the Petition for Writ of Certiorari should be denied.

STATEMENT OF FACTS

1. *The Company's Management Reduction Program*

In the fall of 1985, top management of "the Company decided to reduce the total salary expense of management personnel by 20 percent to remain competitive in an increasingly demanding business environment." (Appendix B 8a). This reduction in force required many jobs and departments to be restructured and positions or whole layers of management to be eliminated or consolidated. The remaining jobs obviously had greater responsibility and heavier work loads, requiring incumbents to work harder and more effectively.

Initially the Company offered a voluntary early retirement package to its management employees who had ten years of service and were over 50 years old. After January 31, 1986, when the elections to voluntarily retire were final, each department, where early retirements had not sufficiently reduced the management payroll, was required to make involuntary terminations so that the total salary reduction met or exceeded the required level. (Appendix B 8a).

The performance of all management-level employees was carefully reviewed in order to retain those who, in the judgment of the Company, displayed the abilities needed to effectively perform the newly increased job duties.

2. *The Effect of the RIF in Healy's Department*

The Company's Home Office Marketing Department where Healy was employed is responsible for the promotion and sale of the Company's insurance and financial products throughout the United States.

The Marketing Department provides training to both agents and managers. The training of agents is centered around how to sell the Company's insurance and financial products. In order "to be successful, sales agents had to learn consumer psychology and technical aspects such as the tax advantages of various products." (Appendix B 6a). "Managers recruited and motivated the agents. The training of managers focused on personnel development, planning and organizing skills, managing expenses, achieving profitability, and the recruiting of new agents." (Appendix B 6a).

At various times in the department's history, the agent training and management training functions have been separated with different individuals responsible for each area, while at other times these functions have been consolidated into a single division. (A 139-40).[2]

Prior to the reduction, the Marketing Department had several parallel levels of management for agent and manager training. As the Court below noted, there were Assistants and Associates who reported to Managers. Managers reported to Assistant Vice Presidents ("AVP") and AVP's reported to their respective Marketing Vice Presidents ("MVP"). The two MVP's for training (one for agents and one for managers) reported to a single Vice President ("VP"). The VP responsible for the Training Division, Walter Ubl, reported directly to a Senior Vice President ("SVP"), Jerald R. Hinrichs, who himself reported to a Vice Chairman. (Appendix B 6a).

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[2] Citations to the record before the Court of Appeals are referred to as "A ____".

Petitioner was employed as MVP in charge of Manager Training since June of 1984 and before that was an AVP for 5 years.

When the results of the voluntary retirement program were finalized for the Marketing Department, a reorganization and additional terminations were required to meet the 20% salary reduction goal.[3] Since the MVP in charge of agent training voluntarily retired, a decision was ultimately made by Hinrichs to eliminate the training MVP level and later, to combine the training of agents and managers.

3. *The Management Reduction Program Did Not Disproportionately Affect The Protected Age Group*

As part of the Company's management salary reduction program, 151 management-level employees, including the petitioner, were involuntarily terminated as of February 25, 1986.

Following the elections under the voluntary retirement program, there were 2893 management-level employees in the group from which the terminees would be selected. 1450 (50%) were under the age of 40, and 1443 (50%) were 40 and over. (A 161). After the involuntary terminations, 2742 management employees remained: 1377 (50%) were under 40, and 1365 (50%) were 40 and over. Thus, the involuntary terminations did not have any disproportionate effect on older workers.

In fact, management employees age 50 to 59 (the petitioner's age group) were terminated at a lower rate than their percentage in the group from which involuntary terminees were selected. Before involuntary terminations, employees age 50 to 59 constituted 17% of the group, but only 10% of those terminated were age 50 to 59. (A 161).

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[3] Petitioner incorrectly claims SVP Hinrichs suggested individual salary consideration played a part in his decision to discharge Healy. (Petition p. 5). In fact all Hinrichs said was that the required 20% salary reduction for the department necessitated further terminations of which Healy was a part. (A 140-41).

To summarize, the Company-wide statistics show no disproportionate effect at all on petitioner's age group:

	Group From Which Involuntary Terminations Were Made		*Composition of the Work Force After Terminations*	
Total	2893	(100%)	2742	(100%)
Under 40	1450	(50%)	1377	(50%)
40 and over	1443	(50%)	1365	(50%)

In the Marketing Department's home office (where Healy worked) prior to the involuntary terminations, 50% (62) of the employees from whom the terminees were selected were under 40, and 50% (63) were 40 or over. 50% of the terminees were under age 40 and the other 50% were over age 40.

Of the 63 employees in the protected age group, 34 (54%) were 50 or over, including several older than petitioner. However, of the eight (8) employees involuntarily terminated, only one (12.5%), the petitioner, was over 50. Four (4) of the eight (8) were under 40, and three (3) (37.5%) were between 40 and 44. (A 162).

Among the ten (10) MVP's in the Marketing Department, petitioner was the only one selected for involuntary termination. Of the nine (9) MVP's who were retained, one was, at 59, older than the petitioner, and another was the same age as petitioner. In fact, six (6) (67%) of the MVP's retained were 50 years of age or older. (A 162).

Thus, the statistics in Healy's department also show no disproportionate effect on the protected age group as the following chart illustrates:

	Group From Which Involuntary Terminations Were Made		*Composition Of The Work Force After Terminations*	
Total	125	(100%)	117	(100%)
Under 40	62	(50%)	58	(50%)
40 and over	63	(50%)	59	(50%)

It is apparent that these figures do not present a picture of a Company or a department trying to rid itself of older employees. Thus petitioner could present no statistical evidence of age discrimination despite his complete discovery.

4. *Healy's Deficiencies in High Level Executive Performance*

The Courts below found that Healy was legitimately discharged as part of the reduction in force because management in his department came to the decision that he did not possess sufficient skill and ability to assume the additional responsibility required in the new competitive environment. (Appendix B 26a). Specifically, SVP Hinrichs said:

> [Healy] could neither effectively supervise a combined [manager and agent] training division nor effectively handle the substantial increase in responsibility that would have been required had he been retained. I found that the plaintiff, rather than taking it upon himself to broaden his responsibilities, would instead try to narrow the scope of his functions. He appeared reluctant to assume expanded responsibilities and encountered problems when faced with coordinating a substantial number of on-going programs. Moreover, he was not good at identifying important future problems or objectives and deciding how to meet them. He also tended to focus only on his own area of responsibility.

(Appendix B 9a, Appendix C 49a)

The Third Circuit noted that Hinrichs' assessment of Healy's deficiencies was based upon a number of specific instances:

> During the years immediately following his 1979 promotion, Healy received generally favorable evaluations. However, these evaluations also evidenced deficiencies in high level executive performance. In a

> November 1983 evaluation, Healy's immediate supervisor, Vice President Walter Ubl, reported that Healy "is a very experienced and valuable employee. . . . His extensive background with the company has enabled him to apply creative approaches to new challenges." But this same evaluation also noted that Healy became "so involved in [one] program that other ongoing programs cause him concern." Nevertheless, Healy received the highest rating possible in this 1983 evaluation and subsequently was promoted to Marketing Vice President in charge of management training in June 1984.

(Appendix B 6a-7a).

> Although Healy earned favorable reviews in this new position, his evaluations revealed significant shortcomings. In a March, 1985 review, Healy's immediate supervisor [who is no longer with the Company] wrote that Healy "demonstrates significant people and team-building skills. He takes direction and guidance easily and quickly. . . . He utilizes good judgment in addressing his responsibilities." But like the earlier evaluation, the reviewer echoed the concern that Healy "must delegate more of the work-load and spend more time in staff development."

(Appendix B 7a).

Another illustration of Healy's deficiencies was his performance when SVP Hinrichs assigned him to the task of preparing the Marketing Department's report for the Company's Management by Objective and Results Program ("MBO").[4]

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[4] MBO is a recent management theory which posits that management will be more effective if it can analyze what it must accomplish and develop measureable standards to test whether or not those objectives have been achieved in key results areas. Each department had an MBO plan which covered the objectives of that department as a whole. The MBO assignment was outside Healy's Field Management Training duties and required him to focus on the work of the entire department, as the plan implicated the interest of the entire department, Hinrichs and Ubl closely reviewed Healy's work. (Appendix B 7a-8a).

The Courts below found that the Company correctly criticized petitioner's performance as he failed to exercise the insight or innovation which the project required. Instead, he made superficial efforts to obtain data, collating and collecting information from others rather than analyzing the problems himself to reach an appropriate result. (Appendix B 17a, Appendix C 55a). The Court found Healy inappropriately narrowed the scope of his assignment to merely collecting data. (Appendix B 17a). The Court also referred to Healy's deposition testimony which itself suggests he had a limited view of his role:

> Q. . . .[T]hey would give you the figures and you would just plug them in?
>
> A. Yes.
>
> Q. You had nothing to do with these figures other than the mechanical?
>
> A. That's true. That was not my job to originate these figures. It was to coordinate and to finalize them on this form.
>
> Q. When you say finalize, do you mean anything other than taking them and putting them on the form?
>
> A. Putting them on the form and then passing it [to Ubl and Hinrichs] for their approval.
>
> . . .
>
> Q. Does [Healy] say, this looks right to me, this doesn't look right to me or does he say, thank you very much. I'm going to put them on the form?
>
> A. My job was to obtain the figures, not to discuss them as to the suitability of the figures.

(Appendix B 17a-18a).

Thus, when faced with a job which required that he adopt a broader focus on the work performed by the department as a whole, and take the responsibility to see that a task different

from his usual area was done well, Healy was unable to perform satisfactorily.

Accordingly, the Company found petitioner's MBO performance lacking in creativity and insight, indicating Healy was not the type of manager who sought to broaden his responsibilities. The Court below agreed finding that the "significance of the evidence about the MBO. . . [was] what his performance indicates about his ability to meet [future] employment challenges." (Appendix B 19a).

5. *How the Work Got Done Following the Reduction in Force*

The key element of management's reduction plan was to accomplish the same amount of work with fewer managers and management levels following the terminations. As the Court found:

> Following Healy's discharge and the voluntary retirement of the Vice President for agent training, Hinrichs initially decided to reallocate the responsibilities of these two positions among the Assistant Vice Presidents. He decided to leave the Vice President positions vacant and to determine later whether to create a consolidated position, combining the functions of both jobs. Most of Healy's responsibilities were assumed by Paul Russell, age 47, with the exception of the MBO program, which was assigned to another Vice President, Richard Carter, age 55.

(Appendix B 9a).

> [In] July 1986, Hinrichs reorganized the Marketing Department, combining the responsibilities of the [Marketing] Vice Presidents in charge of agent training and management training into one position under Russell's direction. This combined position involved more responsibility than the job from which Healy had been discharged and required someone with a broad perspective on the operations of the Marketing

> Department, willing to assume responsibility for both agent and management training in the post-RIF business environment. Indeed, Russell was ultimately responsible for a budget of 4.7 million dollars — over twice as much as Healy's at the time of his discharge.

(Appendix B 9a-10a).

6. *Russell's Responsibilities and Qualifications*

The decision to promote Mr. Russell to Marketing Vice President was based on his superior management abilities and consistently high level of performance over a long period of time. In fact Russell had been with the Company 22 years at the time of Healy's discharge which was just one year shorter than Healy's tenure.

The Court of Appeals found that the record reflected that Russell:

> demonstrated a willingness to assume new responsibilities and that he was flexible and able to delegate. Throughout his tenure in the training division, Russell conceived, designed, and executed numerous programs and initiatives. He also increased his effectiveness. These are the very traits that Hinrichs and Ubl felt Healy lacked. The Company thus credibly argues that the decision to promote Russell was based on his creativity and superior management ability.

(Appendix B 20a).

Healy himself admitted that Russell was an "excellent" performer (Appendix B 20a), with a high level of management ability. Healy evaluated Russell's work, as a "2" on the scale where "1" is the highest score and "5" the lowest. On deposition Healy testified that Russell really rated a number "1" ranking. (A 111).

7. *There Was No Evidence of Age Discrimination*

Petitioner has not and cannot come forward with any evidence of age discrimination to support his claim that he was better

qualified for the consolidated position that Russell assumed or that his discharge was for any reason other than legitimate business considerations. As a result the Courts below properly granted summary judgment dismissing the action.

REASONS FOR DENYING THE WRIT

1. *The Petition Should Be Dismissed Because the Court Below Properly Applied the Established Standard for Summary Judgment in Employment Discrimination Cases*

The Courts below found that Healy had established a prima facie case[5] and New York Life had articulated legitimate

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[5] While respondent denies that petitioner established a prima facie case, since the Courts below resolved this issue in favor of petitioner, petitioner's discussion of how the order-of-proof standards of *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), might apply to reduction-in-force situations under the ADEA (Petition pp. 10-12) is ingenuous. (Appendix B 4a ("Healy established a prima facie case")). If anything, what is questionable is the Court of Appeals' mechanistic finding of a prima facie case on the facts presented here.

The touchstone of a prima facie case of employment discrimination is always whether the challenged actions are "totally arbitrary" so that the Court is "willing to presume . . . from our experience" that the conduct was motivated by impermissible reasons. *See Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). Where, as here, there is a workforce reduction resulting in the elimination of one level of management, the responsibilities of the eliminated position are parcelled out to other employees who are in the protected age category and, further, all the statistical data shows no disparate impact on employees of plaintiff's age or age group, it is hard to imagine how "our experience" suggests even prima facie, age-based discrimination.

Ultimately, although respondent disputes the finding, the prerequisites of a prima facie case of age discrimination under the ADEA in the workforce reduction context is not properly presented by this Petition, as Healy's initial showing of the prima facie case, weak as it is, was upheld by the Courts below. *Cf. United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (After a prima facie case is shown and defendant offers evidence of its legitimate business reason the "*McDonnell-Burdine* presumption drops from the case and the factual inquiry proceeds to a new level of specificity.") (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981).

business reasons for its decision. The only remaining issue, and the sole focus of the lower courts' decisions, was whether Healy met his "evidentiary burden of demonstrating a genuine issue of material fact" as to whether the business reasons articulated by New York Life were "a pretext to mask age discrimination." (Appendix B 5a). Both courts below correctly found petitioner did not meet this burden by direct or indirect evidence. (Appendix B 26a-27a, Appendix C 56a, 59a).

Petitioner, however, argues that a particularly cogent prima facie case of discrimination could itself withstand summary judgment. Petitioner also claims that a prima facie showing always requires a jury trial because issues of motive and intent remain even though petitioner offered no evidence of age discrimination; no statistical proof, no age related disparaging statement, nothing but petitioner's "belief" that his work was good.

Petitioner's sweeping contention that "a plaintiff must *only* enunciate a prima facie case of discrimination and present sufficient evidence indicating that a genuine issue of material fact exists" (Petition p. 11 (emphasis added)) is unsupported by established precedent and contrary to public policy. But in this case petitioner's argument must fail because no such evidence of material fact has been presented after full and complete discovery.

This contention, if it ever was valid, was laid to rest by this Court three years ago in the Summary Judgment Trilogy: *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (rejects argument that summary judgment for defendant should not be granted where state of mind is at issue); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (summary judgment opponent must do more than simply show facts that leave some "metaphysical doubt as to the material facts"); and *Celotex v. Catrett*, 477 U.S. 317 (1986).[6] Additionally, this Court

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[6] Interestingly, every case petitioner cites in support of its proposition predates this Court's opinions in *Anderson, Matsushita and Celotex.* (Petition pp. 10-12).

(Footnote continued)

held that in evaluating a summary judgment motion the court must apply the same substantive standard "that would apply at the trial on the merits." *Anderson* 477 U.S. at 252.

In the employment discrimination context it is well established that the proper standard of proof is the *McDonnell Douglas – Burdine* standard which provides that upon a showing of a prima facie case, the defendant employer must articulate a legitimate nondiscriminatory reason for the employment decision and plaintiff then has the burden to demonstrate the reason is pretextual. *See McDonnell Douglas v. Green*, 411 U.S. 792 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983).[7]

The Courts below applied this exact standard. (Appendix B 12a-13a, Appendix C 56a-58a).

See, e.g., Thornbrough v. Columbus and Greenville R.R. Co., 760 F.2d 633 (5th Cir. 1985); *Moore v. Sears Roebuck & Co.*, 464 F. Supp. 357 (N.D. Ga. 1979); *Fugate v. Allied Corp.*, 582 F. Supp. 780 (N.D. Ill. 1984); *McCorstin v. United States Steel Corp.*, 621 F.2d 749 (5th Cir. 1980); *Lowe v. City of Monrovia*, 775 F.2d 998 (9th Cir. 1985), *modified*, 784 F.2d 1407 (9th Cir. 1986). Additionally, contrary to petitioner's suggestions, the court in *Lowe* did not hold that because plaintiff established a prima facie case summary judgment was inappropriate. In fact, the court analyzed defendant's proffered legitimate reasons why it refused to hire plaintiff and found summary judgment inappropriate as plaintiff had raised a number of material issues of fact concerning the genuineness of those reasons and defendant's overall conduct. *Lowe*, 775 F.2d at 1008.

[7] This Court's recent decision, *Price Waterhouse & Co. v. Hopkins*, 57 U.S.L.W. 4469 (U.S. May 1, 1989) is inapplicable to this proceeding because no direct evidence of age discrimination was (or could be) proffered and no issue of mixed motive is raised here by petitioner.

Petitioner suggests no valid reasons to repudiate the standard which would in effect overrule all accepted precedents of this Court.[8]

Further, applying petitioner's standard would result in the courts and juries unnecessarily second guessing legitimate business and management decisions of employers. This result would be directly contrary to the intent of ADEA and Congress. *See Burdine*, 450 U.S. at 259; *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 207 (1979).

2. *The Petition Should be Dismissed Because Petitioner Proffered Insufficient Evidence of Pretext Under Any Applicable Standard*

Petitioner apparently contends (Petition pp. 13, 20) that the Third Circuit decisions in *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir.)(en banc), *cert. dismissed*, 108 S. Ct. 26 (1987), and *Sorba v. Pennsylvania Drilling Co.*, 821 F.2d 200 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 730 (1988), set the proper standard for showing pretext by indirect or circumstantial evidence in an ADEA case.[9] These cases hold that summary judgment for

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[8] Petitioner's last suggestion (Petition pp. 20-21), taken from the dissent below and not otherwise raised to the Court of Appeals, that there is some Congressional requirement of a jury trial in every charge of age discrimination arising out of a reduction in force is equally meritless. Petitioner's failure to assert such an issue to the court below, of course, precludes certiorari on that point. In any event, as Judges Becker and Higginbotham noted, "the standard for granting summary judgment is *the same* regardless of whether the case would have otherwise been tried by a judge or a jury." (Appendix B 24a (emphasis added)). Petitioner cites no contrary authority from this Court, and respondent is aware of none.

[9] This position is inconsistent with petitioner's statement that the Third Circuit has issued conflicting decisions, providing absolutely no guidance as to its standards for summary judgment in employment discrimination cases. (Petition p. 9). Actually since *Chipollini*, the Third Circuit has consistently applied the standard announced therein for summary judgment in employment discrimination cases. *See, e.g., Hankins v. Temple Univ.*, 829 F.2d 437, 441 (3d Cir. 1987); *Jackson v. University of Pittsburgh*, 826 F.2d 230, 233 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 732 (1988); *Harbison-Walker Refractories v. Brieck*, 822 F.2d

(Footnote continued)

defendants may be denied if "evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge is offered which reasonably *could* support an inference that the employer did not act for non-discriminatory reasons." *Chipollini*, 814 F.2d at 900 (emphasis in original); *accord Sorba*, 821 F.2d at 203.

But, the court below was fully acquainted with its own prior decisions in *Chipollini* and *Sorba*; it simply found that Healy failed to satisfy even those minimal standards for showing pretext by indirect evidence. (Appendix B 23a-25a). In other words, the Third Circuit remained true to its standard but properly found that in this case the standard required summary judgment for defendant.

As Circuit Judge Becker aptly stated, "each ADEA case must be judged *on its own facts*" (Appendix B 14a (emphasis added)), and "despite the breadth of language in *Chipollini*, discrimination cases are inherently fact-bound." (Appendix B 24a). In their plenary review of Healy's facts, Judges Becker and Higginbotham correctly concluded that petitioner simply failed to "introduce evidence that casts doubts on his employer's contention that there was a legitimate business justification for letting him go." (Appendix B 26a).

Thus, even assuming, *arguendo*, that the *Chipollini-Sorba* standard of pretext was applicable, petitioner's only complaint is that the lower court misapplied its rule in this highly fact-bound case. No such misapplication occurred here, but, had it occurred, misapplication of law to facts is hardly a basis for granting certiorari from this Court.[10]

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52 (3d Cir. 1987), *cert. dismissed*, 109 S. Ct. 546 (1988) (dismissing certiorari as improvidently granted). In fact a careful analysis of the cases petitioner cites to support his assertion [Petition p. 8 n. 1 & 2] that a conflict exists amongst the circuits with respect to employment discrimination claims reveals that the cases actually reflect the reality that employment discrimination cases are inherently fact-bound and not that the circuits are applying different legal standards for summary judgment.

[10] This is not to say that the *Chipollini-Sorba* standard is beyond criticism. One may well question the prudence of using evidence of inconsistencies for the

(Footnote continued)

3. *The Petition Should Be Dismissed Because Rule 56 Standards Were Properly Applied In Concluding That There Was No Genuine Dispute As To Pretext Such As Would Require A Jury Trial*

The Court of Appeals' plenary review of the record and conclusion that the evidence presented did not raise a genuine dispute as to pretext, even under the minimal *Chipollini-Sorba* standard, is reason enough to deny the petition. This Court's certiorari power under Supreme Court Rule 17 should not be invoked merely to correct alleged misapplications of law, especially where, as here, the petitioner's case was given plenary consideration by each of two lower courts. Nonetheless, even a cursory review of the decisions below reveal that they were correct.

Each of petitioner's pretext contentions — or, more precisely, allegations of "inconsistencies and implausabilities in the employer's proffered reasons" — were presented to the Courts below. (Relevant pages of the Petition are just lifted verbatim from Healy's Court of Appeals brief, right down to the rhetoric.) These were carefully considered by the Courts and rejected. They may, therefore, be summarily addressed.

First, it is not disputed that Healy received generally positive performance evaluations prior to his termination. (Petition p. 17). The court below found, however, that the "specific weaknesses in Healy's performance" identified as a basis for New

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"unworthy of credence" standard set by this Court. *See, e.g., Burdine*, 450 U.S. at 256. Much mischief can be caused by confused or conniving counsel who conjure purported "inconsistencies and implausibilities" where none exist, thereby sending cases to the jury that should never be so tried and requiring courts to set aside verdicts that no reasonable person could sustain after defendants have already endured the inconvenience and costs of a jury trial. Though there may be reason to question the Third's Circuit's approach as not properly granting summary judgment or judgment n.o.v. in appropriate cases, *See, e.g., Harbison-Walker*, 109 S. Ct. 546 (dismissing certiorari as improvidently granted); *Gunby v. Pennsylvania Elec. Co.*, 840 F.2d 1108 (3d Cir.), *Petition for cert. filed*, (U.S. May 25, 1988) (No. 87-1932), the instant case is not an appropriate vehicle for such review.

York Life's decision — namely, that he did not delegate enough, had too narrow a focus and did not readily assume new responsibilities — "were supported" by his prior performance reviews and his post-termination evaluation. (Appendix B 14a-15a). Moreover, as the Court also noted, the generally favorable evaluations "referred to jobs that demanded less responsibility and initiative than the consolidated position eventually filled by Russell," and showed problems with respect to "factors *clearly relevant* to the demanding managerial job that Russell eventually filled." (Appendix B 15a (emphasis added)). Furthermore, taking into account the context of New York Life's decision, the court below quite correctly concluded that "[g]ood (or even excellent) performance in a lower level position does not necessarily imply success in a more competitive environment." (Appendix B 15a).

Second, that Healy was previously commended for "unflagging dedication . . . and energy" (Petition p. 17) does not raise any genuine issue of *material* fact. Healy's other commendable qualities as an employee in no way suggest that New York Life's proffered reasons for selecting Russell over Healy were "a pretext to mask age discrimination." Again, as the Court below found, successful performance at the job ultimately filled by Russell "required a resourceful executive willing to take initiative and to assume responsibility" (Appendix B 6a); "dedication" and "energy" were not enough. And even Healy admitted that Russell was a superb employee who deserved the highest rating.

Third, neither is pretext shown by Healy's (disputed) allegation that he worked on the MBO project for a year "without receiving any criticism from his superiors." (Petition p. 18). The Court below acknowledged Healy's contention that "he was never warned that he was doing a bad job" (Appendix B 18a), but its response on the question of pretext was exactly correct:

> Although we can sympathize with Healy's situation . . . we note that from a legal perspective *managers are not compelled to convey their dissatisfaction to employees.*

(Appendix B 18a (emphasis added)).

Indeed, as the court suggested, the evidentiary effect of a failure to criticize employee performance "is equivocal, perhaps indicating that [the] plaintiff was receiving the benefit of the doubt." (*Id.* (quoting *Pierce v. New Process Co.*, 580 F. Supp. 1543, 1545 (W.D. Pa.)), *aff'd mem.*, 749 F.2d 27 (3d Cir. 1984))[11]

Fourth, Healy's statement that "his duties as MBO coordinator comprise 10% of his time" (Petition p. 18) also has no bearing on pretext. The Court of Appeals directly responded to this precise point, stating:

> [T]he significance of the evidence about the MBO does not lie in the *amount of time Healy chose to spend* on the project or his own judgment about its importance, but on *what his performance indicates about his ability to meet employment challenges.*

(Appendix B 19a (emphasis added)).

As to meeting "employment challenges" in the new competitive environment facing New York Life, there is no dispute: Healy's work on the MBO program "lacked creativity and initiative" (Appendix B 8a), which were among the factors that New York Life "deem[ed] essential to high-level executive positions" (Appendix B 27a), especially after the reduction in force.

Fifth, the fact that most of Healy's responsibilities were assumed by Russell, who was younger (though still in the protected class and had been with respondent only one year less than Healy) was relied on by the lower courts to show a prima facie case (but

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[11] In fact, the record actually reflects criticism and dissatisfaction by Healy's superiors with his work. Over a period of several months petitioner's work on the project had to be repeatedly resubmitted to his superiors as it was inferior and insufficient and his supervisor was forced to meet with him almost daily to insure the project's proper completion. (A 166-67). Obviously, the fact that a top level executive must repeatedly resubmit his work in and of itself represents substantial criticism and dissatisfaction with his work on the part of his superiors.

see page 12 *supra*). But it is of no relevance on the issue of pretext. After considering affidavits of New York Life's senior managers who evaluated Russell vis-a-vis Healy and Healy's own high regard for Russell's ability, the Court of Appeals put the matter in sharp focus:

> The record reflects that Russell demonstrated a willingness to assume new responsibilities and that he was flexible and able to delegate. . . . These [were] *the very traits* that Hinrichs and Ubl felt Healy lacked. The Company thus credibly argues that the decision to promote [*sic*] Russell was based on his creativity and superior management ability.
>
> . . . . We thus find insufficient evidence of pretext to permit a reasonable fact finder to infer discrimination in the Company's selection of Russell over Healy.

(Appendix B 20a (emphasis added)). *Accord*, Appendix B 26a (New York Life "proffered evidence showing that Healy's replacement [*i.e.*, Russell] was ***better qualified*** to exercise the kind of initiative, creativity, and management discretion required of a high level executive") (emphasis added)).

Ultimately, the issue in the case in the Courts below boils down to whether Healy presented any evidence from which a reasonable person could infer age-based discrimination in New York Life's decision to retain Russell and select Healy for termination. Judge Becker writing for the majority below zeroed in on precisely this point. After noting that New York Life's legitimate business reasons for its decision were "corroborated . . . with statistical evidence suggesting that there was *no discriminatory intent* by the relevant decision makers" (Appendix B 26a (emphasis added)), he went on to state:

> In the end, the evidence provided by Healy demonstrates only that he performed competently in his previous jobs. But the *essence of a RIF is that competent employees who in more prosperous times would*

> *continue and flourish at a Company may nevertheless have to be fired.* To create a factual dispute as to pretext, Healy must . . . introduce evidence that casts doubts on his employer's contention that there was a legitimate business justification for letting him go. We agree with the district court that *Healy's efforts to contrast his qualifications vis-a-vis Russell's*, given his limitations described above, *are legally insufficient to cast such doubt.*

(Appendix B 26a (emphasis added)).

There is no better way to state why Healy's suggestions of pretext must fail.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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